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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SECOND APPELLATE DISTRICT

DIVISION FIVE

THE PEOPLE,

Plaintiff and Respondent,

v.

CHRISTINE ELI,

Defendant,

MINAKO TOGASHI,

Appellant.

B230731

(Los Angeles County
Super. Ct. No. SA066213)

APPEAL from a judgment of the Superior Court of Los Angeles County.

James R. Dabney, Judge. Affirmed.

Timothy J. Hadlock for Appellant.

Kamala D. Harris, Attorney General, Dane R. Gillette, Chief Assistant Attorney General, Kenneth C. Byrne and Charles S. Lee, Deputy Attorneys General, for Plaintiff and Respondent.

Minako Togashi, a crime victim, appeals from an order denying in part her motion for supplemental restitution and an order dismissing the case against defendant Christine Eli,¹ pursuant to a plea agreement. We affirm.

Factual and Procedural Summary²

This case concerns a restitution order, and we summarize the facts with that in mind.

In February of 2003, Togashi responded to a newspaper advertisement in which Eli advertised herself as a psychic. During the next two years, Togashi gave Eli over \$200,000 for Eli's purported services. In particular, in May of 2003, Togashi gave Eli \$60,000, on Eli's representation that the money would be returned after being put in a dark place for a period of three years. Togashi was then to donate the money to charity, resulting in a specified positive change in her life.

Then, in April of 2005, Togashi and her husband demanded that Eli return Togashi's most recent payment, \$81,000. Eli did so.

Togashi also complained to law enforcement, and at some point filed a civil lawsuit against Eli, seeking return of all sums she had paid Eli, costs of suit, emotional distress damages, prejudgment interest, punitive damages, an injunction under the Consumers Legal Remedies Act, and other damages.

In June 2008, the Los Angeles County District Attorney filed an information against Eli, bringing one count of grand theft, Penal Code³ section 487, subdivision (a). Eli pled no contest to that charge in August 2008.

The plea was the result of a plea agreement. The agreement described by the district attorney to the court and by the court to Eli was: Eli would plead to the charge.

¹ Eli has not filed a brief in response. The Attorney General has.

² The factual background is taken from the evidence at the preliminary hearing.

³ All further statutory references are to the Penal Code unless otherwise indicated.

Sentencing would be continued for 90 days. Eli would be obligated to pay \$60,000 in restitution to Togashi within that period. If she did, the court would hold a hearing on further restitution. If the court were to order further restitution, Eli would be obligated to pay that amount. She would be given a period of time in which to make the payment. If she did not make the payment, she would be placed on probation until the payment was made. At that point, the case would be reduced to a misdemeanor, her plea would be vacated, and the case dismissed.

The restitution hearing was originally set for November 14, 2008. In a pleading filed for that hearing, Togashi requested restitution in the amount of \$230,075, consisting of the \$210,650 which she had paid Eli, minus the \$81,000 already returned; \$660 incurred in 2003, when Togashi travelled from San Francisco, where she lived, to Los Angeles, for a meeting with Eli; \$1,485 in prosecution-related travel expenses incurred by Togashi and her husband; \$35,011 which Togashi expended in attorney's fees in the criminal and civil actions; and \$63,269, representing 10 percent interest on \$129,650 (the amount Togashi paid Eli less the \$81,000 Eli returned) from date of loss, which she asserted was December 30, 2003, until November 14, 2008, the originally-scheduled date of the restitution hearing.⁴ The prosecution made the same restitution request.

Eli paid the initial \$60,000 on December 18, 2008.

The restitution hearing took place on February 19, 2009. At oral argument, Togashi asked for a restitution award of \$170,075, consisting of the \$230,075 originally requested, minus the \$60,000 which Eli paid in December. She also asked for interest on the restitution award, from date of sentencing. (§ 1202.4, subd. (f)(3)(G).)

Imposition of sentence was suspended, and Eli was placed on three years' formal probation on the condition, inter alia, that she pay restitution to Togashi in the amount of \$170,075.

⁴ In her September 2007 first amended complaint in her civil suit against Eli, Togashi sought the \$129,650 paid to Eli, plus emotional distress damages, costs of collection, prejudgment interest, attorney fees, and so on.

The Order for Restitution, prepared by counsel for Togashi, specifies that the order is that Eli pay \$135,064 in restitution, plus interest of 10 percent from date of sentencing, plus attorney fees and collection costs of \$35,011.

Progress hearings on restitution were held in March, September, and December of 2009 and in June of 2010. Only nominal payments were made in that period.

Togashi then learned that Eli was a co-owner of real property in New York. In July and September progress hearings, counsel for Eli and counsel for Togashi updated the court on Eli's ownership of that asset and on their discussions concerning payment of restitution. At a hearing on November 8, 2010, the court repeated the terms of the plea agreement to Eli's new counsel: On payment of \$170,075 in restitution, the case would be dismissed.

A further hearing was scheduled for December 6, 2010. Prior to the hearing, Togashi filed a pleading titled "notice of accrued post-order interest." Togashi asserted that the restitution order included 10 percent interest, and that the accrued interest on \$170,075, through the December 10, 2010 hearing date, was \$30,749.⁵

On December 6, 2010, Eli appeared through counsel, with a check for Togashi in the amount of \$170,075. She asked that the case be dismissed pursuant to the plea agreement. Togashi, who was represented at the hearing, objected. The court reviewed the transcript of the February 19, 2009 plea and of subsequent hearings, heard oral argument, and determined that the agreed-on disposition was that the case would be dismissed on payment of \$170,075. The court found that while Eli had been ordered to pay interest, and that Togashi could enforce that order as a civil judgment, the plea agreement did not condition dismissal of the case on the payment of interest.

The court dismissed the case, but stayed the dismissal until January 5, 2011, to make sure that Eli's check cleared. (It did.)

⁵ In a later pleading, Togashi explained that she filed this motion after learning that in early December, an attorney for Eli had contacted the district attorney and offered to pay "the amount stated at the November 8, 2010 hearing," that is, \$170,075.

Togashi then filed a motion for reconsideration of the order of dismissal, and a motion to vacate an order modifying the restitution order, contending that on November 8, 2010, when the court re-stated the amount of restitution due, the court modified its original order.

She also filed a motion for supplemental restitution (§ 1202.4, subd. (f)(1)), seeking \$121,505 in additional attorney fees in the civil case, \$16,854 in additional attorney fees in the criminal restitution proceedings, and \$3,627 in travel and other costs of collection in both the civil and criminal cases.

The matters were heard on February 4, 2011. The court denied the motion for reconsideration, noting, again, that while Togashi was entitled to interest under the statute, a review of the transcripts established that the plea agreement did not involve payment of post-order interest. On the motion concerning the purported November 8, 2010 modification of the restitution order, the court ruled that there was no modification on that date, but that the court had merely repeated the original plea agreement. On the motion for supplemental restitution, the court denied the motion insofar as it sought additional attorney fees in the civil case, but ordered supplemental restitution for the other costs claimed, for a total of \$20,481 in additional restitution.

The court then reduced the charge to a misdemeanor and dismissed the case.

Discussion

Togashi has two contentions on appeal. She argues that the trial court erred when it dismissed the case, in that the plea agreement provided that the case would be dismissed only when "full restitution" was paid, and that full restitution included interest. She also contends that the court erred when it failed to grant, in full, her motion for supplemental restitution.

1. The dismissal

a. *Standing*

The Attorney General, respondent herein, contends that Togashi does not have standing to appeal the dismissal. Respondent argues that standing is reserved for parties,

that is, the defendant and the prosecution (*People v. Punzalan* (2003) 112 Cal.App.4th 1307, 1310) and for persons aggrieved by an order or judgment (*People v. Hernandez* (2009) 172 Cal.App.4th 715, 720). Respondent argues that Togashi is not aggrieved by the dismissal because she can enforce the order that Eli pay interest as a civil judgment.

We find that Togashi has standing. Under the California Constitution, "A victim, . . . may enforce the rights enumerated in subdivision (b) in any trial or appellate court with jurisdiction over the case as a matter of right." (Cal. Const., art. I, § 28, subd. (c)(1).) Subdivision (b) provides, inter alia, that a crime victim has the right to restitution. (Cal. Const., art. I, § 28, subd. (b)(13).)

Respondent argues, however, that this constitutional provision does not give Togashi standing because this appeal is not an attempt to enforce her right to restitution. Respondent argues that the judgment dismissing the criminal case did not infringe on Togashi's rights, because she can enforce the restitution order as a civil judgment.

We think respondent attempts to draw too fine a line. It is true that, as the trial court noted, Togashi can enforce the restitution order as a civil judgment. However, the Constitution grants her a right to appeal matters concerning restitution, and the judgment of dismissal is surely such an order, even if it only affects the manner in which she may collect the sums ordered. Especially given the important constitutional rights at stake, we cannot see that the right to enforce the order as a civil judgment means that Togashi is not aggrieved by the judgment of dismissal. (See *People v. Bufford* (2007) 146 Cal.App.4th 966, 971 [victim's theoretical right to pursue civil remedy is not a substitute to the constitutional right to restitution].) We are persuaded that Togashi has standing to challenge the dismissal.

Togashi, in turn, argues that the respondent does not have standing on appeal. She points out that in the trial court, the prosecution opposed the dismissal, and argues that it may not take another position now. Finally, she argues that, in general, a crime victim filing an appeal should not have to be adverse to two respondents, the defendant and the prosecution.

We are satisfied that the prosecution, which is a party to the criminal case, has standing to file a brief on appeal. It is true that in the trial court, the prosecution opposed the dismissal, but we cannot see that respondent is taking an inconsistent position here. As to the dismissal, respondent raises only the question of Togashi's standing, and we believe that it has standing to do so.

b. *The merits*

Togashi asserts that the trial court erred in construing the plea agreement. She cites statements made to Eli by the court and district attorney, to the effect that restitution would have to be paid "in full" before the case was dismissed and notes that under the statute, a victim is entitled to "[i]nterest, at the rate of 10 percent per annum, that accrues as of the date of sentencing or loss, as determined by the court." (§ 1202.4, subd. (f)(3)(G).) She concludes that payment in full means payment which includes interest, and that the plea agreement clearly and unambiguously provided that interest would have to be paid before the case was dismissed.

We do not agree. As the trial court noted during the several hearings on this subject, Eli was ordered to pay interest on the restitution award. However, that does not mean that payment of interest was part of the plea agreement, and a condition for the dismissal. Instead, after careful review of the record, the trial court determined that interest was not part of the plea agreement, noting that given that Eli was not clearly informed that she would have to pay the interest before the case was dismissed, "I believe I would have to allow Ms. Eli to withdraw her plea, because I don't believe that that was clear enough set out as a condition."

The trial court also noted that "this was a triable case," and that "it's hard to envision how a jury ultimately would come out on this," so that both prosecution and defendant gave and got something from the plea agreement.

In her brief, Togashi sometimes seems to suggest that the court found that the plea agreement was ambiguous. The court did at one point discuss that concept, but did not find an ambiguity, but repeatedly ruled that it was "enforcing the agreement as I read it."

The court's and district attorney's references to "full restitution" do not establish otherwise, but instead prove the point. In context, the court told Eli that the plea agreement was that Eli would pay \$60,000 immediately, that if the payment was made "a restitution hearing will be held . . . to determine if there is any further restitution. [¶] If there is further restitution ordered, you will be given another 60 days or so in order to pay off that amount, and we'll put over your probation and sentencing to have that amount paid. [¶] If you come back and restitution is paid in full . . . your plea of guilty will be vacated, and the case will be dismissed. [¶] If, on the other hand, you fail to make the full payment of restitution . . . you'll be placed on three years' formal probation unless and until you pay off the restitution." The statement by the district attorney was made during the district attorney's explanation of the plea agreement, to the court. The district attorney said, "If the court orders any further restitution, the defendant would be obligated to pay that amount of restitution. When the defendant pays the full amount of restitution, whenever that is ordered by the court . . . [¶] . . . when the full amount of restitution is paid, the matter would be reduced to a misdemeanor . . . and then the case would be dismissed." In each instance, the statement was that the case would be dismissed after Eli paid the amount determined at the hearing.

Togashi next argues that if the plea agreement did not include interest, the agreement violated her rights under the statute, because an order that the defendant pay interest on the restitution award is mandatory. (§ 1202.4, subd. (f)(3)(G), *People v. Valdez* (1994) 24 Cal.App.4th 1194, 1203.) The court ordered Eli to pay interest, as the statute directs. We thus see no violation of Togashi's rights, or of the restitution law.

Nor do we agree with Togashi that the district attorney was prohibited from entering into this plea agreement, or the court from accepting it. She argues, essentially, that the right to restitution means that a district attorney cannot, as the district attorney did here, agree to dismissal pursuant to a plea agreement unless the agreement includes payment of interest, and, indeed, any supplemental costs a victim may incur in collection efforts after the initial restitution order.

We cannot see that the statute so provides. It does not limit the district attorney in such situations, but instead provides that restitution may be enforced as a civil judgment. (§ 1202.4, subd. (i).)

Togashi also argues that Eli waived the right to assert that payment of interest was not part of the plea agreement, or that she conceded this point. Contrary to Togashi's argument, Eli on several occasions asserted that the plea agreement provided that the case would be dismissed on payment of \$170,075. Attachments to Togashi's motions indicate that when Eli made settlement offers she indicated her understanding that there was an order that she pay interest, but that is all.

We say the same about Togashi's reliance on a statement by Eli's counsel, at a September 2010 hearing. The statement was made during a colloquy with the court concerning an asset, real property in New York, which Eli owned with family members. Eli was arguing that she did not have the resources to partition the property, and that Togashi could secure payment of all sums due if she executed on liens she had placed on the property. Eli's counsel said, colorfully, "Here's the dilemma: We want them to be paid. It's as if I've got whatever it is. I think [Togashi's counsel] thinks it's a couple hundred thousand dollars. It probably is with interest. . . . I've got a basketful of money. I've laid it down on the ground, and [Togashi's counsel] doesn't want to bend over and pick it up." Counsel was referring to the total sum owed and the method of collection, not to the terms of the plea agreement.

Finally, Togashi argues that because Eli violated her probation, she had no right to enforce the plea agreement, arguing that "where a defendant is granted probation as part of a plea bargain violates that probation, subsequent sentencing is not limited by the terms of the original plea. [Citations.]" (*People v. Martin* (1992) 3 Cal.App.4th 482, 487.)

There was, however, no finding of a probation violation. Togashi argues that a probation violation hearing, and a finding of violation, took place on September 8, 2010. A review of the record indicates that at that hearing, after receiving information from both Togashi and Eli concerning Eli's ownership of real property in New York, the court

revoked probation and continued the matter for a hearing on Eli's ability to pay restitution. That hearing never took place. Instead, Eli proffered a check for the amount ordered, and the court dismissed the case.

2. The motion for supplemental restitution

In her original request for restitution, Togashi sought and obtained, \$19,731 for attorney fees in the civil suit she filed against Eli, which was then underway.

In her supplemental motion, Togashi sought, *inter alia*, an additional \$121,505 for attorneys' fees incurred in that case, which had concluded. She submitted the declaration of her counsel in the civil case and her own declaration, to the effect that the retainer agreement provided that she would be billed \$350 an hour, but would pay only a small portion each month, and would pay the remainder if and when she received a favorable settlement or judgment, and to the effect that judgment was entered in the civil case after trial in October 2009, in Togashi's favor, and \$121,505 was now due.⁶

Although the court awarded other costs which Togashi requested in the motion for supplemental restitution, it denied the request for additional attorney fees in the civil action, noting that "I'm not inclined to augment the restitution order by subsequent attorneys' fees that involved additional . . . losses that were being sought to be recovered civilly."

Togashi contends that the court erred when it denied her the full amount requested.

We begin by noting that her arguments on appeal rest in part on what seems to us to be a false premise, that the trial court denied the motion because it erroneously believed that the additional fees were incurred after the original restitution order, and erroneously believed that under the law, such fees were not recoverable. Respondent echoes this argument, contending that it is unclear whether Togashi informed the court that the fees she sought were incurred before the original restitution order was made.

⁶ According to the declaration of counsel, the judgment was in the amount of \$323,491, which sum included \$150,000 in attorney fees and other costs.

Respondent asks that the matter should be remanded for further consideration by the trial court.

We see no confusion. Togashi set out her request and the basis for it, and the record indicates that the trial court was aware of and understood her request. Moreover, we do not understand the trial court to have denied the request due to an erroneous understanding of either the facts or the law. Instead, the court exercised its discretion under the law.

Nor do we agree with Togashi that she was entitled to all the supplemental fees as a matter of law. It is true that under section 1202.4., subdivision (f)(3)(H), a crime victim is entitled to restitution for "[a]ctual and reasonable attorney's fees and other costs of collection" Under this statute, a victim is entitled to attorney fees incurred in the collection of economic losses. (*People v. Fulton* (2003) 109 Cal.App.4th 876, 885-886.)

However, "The restitution statutes do not authorize restitution for legal fees incurred to recover general damages, only those incurred for collection of economic loss. (Pen. Code, § 1202.4, subd. (f)(3).)" (*In re Imran Q.* (2008) 158 Cal.App.4th 1316, 1321.)

We review a restitution order for abuse of discretion. (*People v. Gemelli* (2008) 161 Cal.App.4th 1539, 1542.) When there is a factual and rationale basis for the amount awarded, no abuse of discretion will be found by the reviewing court. (*People v. Keichler* (2005) 129 Cal.App.4th 1039, 1045.) We see no abuse of discretion here.

Togashi's civil lawsuit against Eli was not limited to economic losses. Instead, as the trial court noted, she sought to recover the amounts she had paid Eli, damages for emotional distress and punitive damages, and also sought an injunction under the Consumers Legal Remedies Act, enjoining Eli from further deceptive practices. (Civ. Code, §§ 1770, 1782.)

Further, Togashi obtained her judgment in the civil case many months after the court in the criminal case ordered restitution for all of Togashi's economic losses. The court could thus have found that additional attorney hours spent in the civil cases were not reasonable fees incurred in collection, but instead involved redundant efforts.

Disposition

The judgment is affirmed.

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ARMSTRONG, J.

I concur:

KRIEGLER, J.

Turner, P. J.

I concur. I fully agree with my colleagues' standing analysis. As to the merits, the trial court could reasonably find the victim, Minako Togashi, failed to make a prima facie showing *reasonable* fees were incurred. (Pen. Code, § 1202.4, subd. (f)(3)(H); *People v. Taylor* (2011) 197 Cal.App.4th 757, 761; *People v. Millard* (2009) 175 Cal.App.4th 7, 31.) The trial court could have reasonably find the billing evidence was insufficient to sustain Ms. Togashi's initial burden of proving the fees were actual and reasonable. (See *People v. Fulton* (2003) 109 Cal.App.4th 876, 883-885.) There was no specific breakdown of time spent and tasks performed; just nonspecific bills. And even if the victim's initial prima facie burden was satisfied, the trial court could reasonably find she did not demonstrate by a preponderance of the evidence the fees were reasonable. As noted, the billing evidence was nonspecific and did not address the reasonableness issue.

Further, the trial court's failure to set forth compelling and extraordinary reasons for not imposing further restitution has been forfeited by the failure to contemporaneously object. (*People v. Tillman* (2000) 22 Cal.4th 300, 302-303; *People v. Scott* (1994) 9 Cal.4th 331, 353.) In any event, the duty to set forth compelling and extraordinary reasons for not imposing further restitution arose only if the victim sustained her burden of proof. That, the trial court could reasonably rule, did not occur here.

TURNER, P. J.